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No. 87-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF NEW JERSEY,

Petitioner,

v.

LINDA DELUCA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Subsequent to respondent's trial for death by auto, the charge of driving while intoxicated against respondent was dismissed based upon a claim of double jeopardy arising under the United States and New Jersey Constitution. Such dismissal was predicated upon the State's concession that the sole proof of recklessness in the death by auto trial was respondent's driving while intoxicated. The New Jersey Supreme Court, on certification, determined that the alternative test for double jeopardy analysis provided by *Illinois v. Vitale*, 447 U.S. 410 (1980) would preclude the prosecution of respondent. However, based upon the State's recantation before the New Jersey Supreme Court of its earlier concession, the court remanded the matter to the Law Division to review the trial transcript and to make a factual determination of the proof of respondent's recklessness presented at the death by auto trial.

QUESTIONS PRESENTED:

1. The remand by the New Jersey Supreme Court to the Law Divison for a factual determination of the proof of respondent's recklessness presented at the death by auto trial does not constitute a final judgment subject to review by the United States Supreme Court.

2. The decision of the New Jersey Supreme Court was based upon an interpretation of the double jeopardy provision of the New Jersey Constitution and as such the decision is supported by adequate and independent state grounds.

3. The State's proof of respondent's intoxication at the death by auto trial affords respondent the benefit

of the alternative test for double jeopardy analysis provided by *Illinois v. Vitale.*

4. The United States Supreme Court decision of *Illinois v. Vitale* established an alternative test for double jeopardy analysis in addition to the test established by *Blockburger v. United States* and affords respondent constitutional protection against double jeopardy.

PARTIES TO THE PROCEEDING

The caption of the case in this Brief in Opposition contains the names of all parties to the proceeding in the state court below.

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STATE OF NEW JERSEY,

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LINDA DELUCA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Linda DeLuca, respectfully prays that a petition for writ of certiorari sought by the State of New Jersey to review the judgment and opinion of the Supreme Court of New Jersey entered in the above-entitled proceeding be denied.

OPINIONS BELOW

The opinions of the state courts are included in the Appendix of the State's petition.

JURISDICTION

The respondent, Linda DeLuca, contests the jurisdiction of the Court for the reasons set forth in this Brief in Opposition.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

This constitutional provision is set forth verbatim in the text of the State's petition.

NEW JERSEY CONSTITUTION, ART. 1, PAR. 11

No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.

STATUTES INVOLVED

NEW JERSEY STATUTES ANNOTATED sec. 2C:11-5 (West 1982 & Supp. 1984)

The provisions of this statute are set forth verbatim in the text of the State's petition.

NEW JERSEY STATUTES ANNOTATED sec. 39:4-50(a) (West 1973 & Supp. 1984)

The provisions of this statute are set forth verbatim in the text of the State's petition.

NEW JERSEY STATUTES ANNOTATED sec. 2C:1-14(d) (West 1982)

2C:1-14. In this code, unless a different meaning plainly is required:

d. "Conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omission [sic].

NEW JERSEY STATUTES ANNOTATED sec. 2C:2-2(b)(3)
(West 1982)

2C:2-2. General Requirements of Culpability

(b)(3) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

NEW JERSEY STATUES ANNOTATED sec. 39:4-96
(West 1973 & Supp. 1987)

39:4-96. Reckless Driving:

A person who drives a vehicle on a highway heedlessly, in willful or wanton disregard of the rights or safety of others, in a manner so as to endanger, or be likely to endanger, a person or property, shall be guilty of reckless driving and be punished by imprisonment in the county or municipal jail for a period of not more than 60 days, or by a fine of not less than $50.00 or more than $200.00, or both.

On a second or subsequent conviction he shall be punished by imprisonment for not more than 3 months, or by a fine of not less than $100.00 or more than $500.00, or both.

STATEMENT OF THE CASE

Linda DeLuca, respondent herein, was involved in a fatal motor vehicle accident with a pedestrian on January 29, 1984. Respondent was issued two motor vehicle sum-

monses as a result of the accident, alleging violations of N.J. Stat. Ann. 39:4-96 (reckless driving) and N.J. Stat. Ann. 39:4-50 (driving while intoxicated—DWI). Thereafter, on April 4, 1984, a grand jury returned an indictment against respondent which alleged a violation of N.J. Stat. Ann. 2C:11-5 (death by auto).

Pursuant to a directive issued from the New Jersey Supreme Court in *State v. Dively*, 92 N.J. 573, 589 (1983), prosecution of the motor vehicle offenses was withheld until there was a disposition of the greater indictable offense. Respondent was acquitted of the death by auto charge by a petit jury and general verdict in January, 1985.

Thereafter, respondent moved to dismiss the two motor vehicle summonses on the basis that such further prosecution would constitute double jeopardy under the United States and New Jersey Constitution. The State conceded that the reckless driving offense was a lesser included offense of death by auto, and that further prosecution of respondent based upon the *Dively* precedent would constitute double jeopardy. The *Dively* decision iterated the elemental analysis of *Blockburger v. United States*, 284 U.S. 299 (1932) and *Brown v. Ohio*, 431 U.S. 161 (1973), as modified by *Illinois v. Vitale*, 447 U.S. 410 (1980), as the standard for double jeopardy analysis in New Jersey. Remarkably, the two statutes involved (N.J. Stat. Ann. 39:4-96 and N.J. Stat. Ann. 2C:11-5) arguably would not withstand scrutiny under the analysis of *Blockburger* and *Brown* because of a dissimilarity in elements of each offense. However, the State conceded that double jeopardy would apply to the offense of reckless driving despite the apparent failure of the statutory offenses to satisfy the criteria of *Blockburger* and *Brown*. Lastly, the presiding judge concluded that respondent "[i]s being tried in the municpal court on the same facts but not on the same charges" (Pet. App. B, at p. 17a), and consequently denied respondent's request to dismiss the charge of DWI.

Respondent received interlocutory leave to appeal to the Superior Court, Law Division. Oral argument was heard on July 29, 1985. Respondent alleged that the sole proof of respondent's "recklessness" offered by the State at the death by auto trial was limited to respondent's driving while intoxicated. The material element, "recklessly" or "recklessness" of the death by auto statute is a defined term set forth in N.J. Stat. Ann. 2C:2-2(b)(3). During the court's consideration of the appeal, the prosecutor who represented the State at the death by auto trial conceded that the proof that went to the element of recklessness was limited solely to those matters dealing with the respondent's intoxication. (Pet. App. C, at p. 23a). The State fails to mention this concession in the statement of the case presented in its petition. This concession was made by the prosecutor who was in full charge of the prosecution of respondent for death by auto, and who gathered the evidence of respondent's recklessness for presentment at trial. The Law Division thereafter dimissed the DWI charge against respondent.

The State appealed the judgment of the Law Division to the Superior Court, Appellate Division. Respondent again alleged that principles of double jeopardy under the United States and New Jersey Constitution precluded a subsequent prosecution of respondent for DWI. The Appellate Division, in a unanimous opinion, first highlighted the difficulty which the courts have had in determining what is a "same offense" for double jeopardy purposes, and noted that the New Jersey Supreme Court has clearly eschewed any single legal test for double jeopardy, focusing more appropriately upon "fairness and fulfillment of reasonable expectations in light of the constitutional and common law goals." (Pet. App. E, at pp. 31a-32a). The appellate court then discussed its interpretation of *Blockburger, Brown* and *Vitale*, in light of the New Jersey Supreme Court's analysis of these cases in the *Dively* decision. Based upon a determination that "[e]ach case, therefore, must

be considered in light of its own particular facts and circumstances" (Pet. App. E., at p. 32a), and the State's concession that the proof that went to the element of recklessness at the death by auto trial was limited solely to respondent's intoxication, the appellate court concluded that principles of double jeopardy bar the further prosecution of respondent for DWI.

The State asserts in its petition that the Appellate Division was incorrect in its reliance upon respondent's "allegation" that the sole proof of recklessness was respondent's intoxication. The Appellate Division, however, did not rely upon a mere allegation by respondent, but the aforesaid concession made by the State in the Law Division. The State moved for reconsideration of the judgment of the Appellate Division on March 24, 1986. The State's motion was denied on April 2, 1986. (Pet. App. F, at pp. 43a-44a).

Thereafter, on May 5, 1986, the State petitioned the New Jersey Supreme Court for certification to the Superior Court, Appellate Division. This petition alleged that the interpretation of *Vitale* by the Appellate Division was erroneous, and, in addition, the facts of the instant case were not within the scope of the *Vitale* decision. Additionally, the State filed a certification which indicated that the earlier concession by the State in the Law Division was no longer valid. The specious allegations contained therein referred to weather, road and lighting conditions which could create an inference of recklessness on the part of respondent, in addition to her alleged intoxication. This certification blatantly failed to assert criminal "conduct" on the part of respondent, as defined, and as required by the material element of "recklessly" in the death by auto statute. N.J. Stat. Ann. 2C:1-14(d); N.J. Stat. Ann. 2C:2-2(b)(3). This certification also attempted to invoke a *res ipsa* doctrine into a criminal proceeding, which has been rejected by the New Jersey courts. *State v. Wenzel*, 113 N.J. *Super.* 215 (App. Div. 1971). The submission of this

contradictory certification was fashioned out of a desperateness to continue the vexatious prosecution of respondent without regard to the facts of the case and relevant state law which defines criminal conduct.

The New Jersey Supreme Court granted certification, and on July 21, 1987, reversed the decision of the Appellate Division, and remanded the case to the Law Division, to review the trial transcript of the death by auto trial and to determine whether intoxication was offered as the sole proof of respondent's recklessness. The trial transcript was not before the court and was unnecessary throughout the lower court proceedings because of the State's earlier unequivocal concession that intoxication was the sole proof of respondent's recklessness offered at the death by auto trial. The factual controversy before the New Jersey Supreme Court and the subject of the remand is solely the result of the State's now inconsistent and self-serving position concerning the proof of respondent's recklessness at the death by auto trial.

The New Jersey Supreme Court reviewed the *Blockburger, Brown* and *Vitale* precedent of this Court, and also its own decision in *State v. Dively*, 92 N.J. 573 (1983). The court in *Dively*, applying the *Blockburger* test, upheld a defendant's claim of double jeopardy on a death by auto charge where the defendant had previously pled guilty to the offense of DWI within which the offense of reckless driving had been merged. Due to the respective terminology of the death by auto and reckless driving statutes, *Blockburger* review was not precluded. In the case at bar, the court first specifically applied the *Blockburger* test to the statutes pertinent to the within matter (Pet. App. A, at pp. 10a-11a), and concluded that comparison of the statutory elements in their abstract form is virtually meaningless. (Pet. App. A, at pp. 12a-13a). However, based upon the *Vitale* precedent, double jeopardy would bar the DWI prosecution "[i]f the State relied solely on intoxication as evidence of recklessness in the death-by-auto case",

which would be determined pursuant to the remand to the Law Division. (Pet. App. A, at p. 11a). The court concluded that *Vitale* afforded respondent protection against double jeopardy based upon a second prosecution upon the same facts. The court also issued a directive that the Superior Court of New Jersey assert jurisdiction over the non-indictable offense of DWI where such an offense is charged in conjunction with the indictable offense of death by auto, and that both charges are to proceed simultaneously within the death by auto trial. (Pet. App. A, at pp. 13a-14a). See *State v. Saulnier*, 63 N.J. 199 (1973).

REASONS FOR DENYING THE WRIT

Point I

The Remand By The New Jersey Supreme Court to The Law Division For A Factual Determination of The Proof of Respondent's Recklessness Presented at The Death By Auto Trial Does Not Constitute A Final Judgment Subject to Review By The United States Supreme Court.

The standard of review for determining whether a state court judgment would be subject to review by the United States Supreme Court was succinctly described in the case of *New York Times Co. v. Jascalevich*, 439 U.S. 1317 (1978), Justice White indicating:

> Whether a state-court judgment is subject to review by the Supreme Court on writ of certiorari is in turn governed by 28 USC sec. 1257 . . . which provides that we have jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." Also, it is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases.

Id. at 1318. It is well settled that the Supreme Court lacks jurisdiction to review cases under 28 U.S.C. sec. 1257 where there is no "final judgment" of the highest state court. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1956).

The United States Supreme Court has enunicated the efficaciousness of the "final judgment" rule as serving to (1) avoid piecemeal review by federal courts of state court decisions, (2) avoid the giving of advisory opinions in cases where there may be no real case or controversy in the sense of Article 3 of the United States Constitution, and (3) limit federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion into state affairs. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). Another salutary effect of this doctrine is that it prevents litigants from obtaining a decision on federal grounds which, after later proceedings, might prove to be unnecessary and irrelevant to the complete disposition of the litigation. *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953).

The fundamental question as to when a judgment shall be deemed "final" for review purposes is whether there has been an effective determination of the litigation and the issues are adjudged. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). It has been further stated that a state court judgment, in order to be the subject of review by the United States Supreme Court, must be the subject of no further review or correction in any other state tribunal, and also must be an effective determination of the litigation and not merely an interlocutory or intermediate step therein. *Market Street R. Co. v. Railroad Com. of California*, 324 U.S. 548 (1945).

The manner of disposition of the litigation by the state court is frequently dispositive of the issue of whether a state court judgment may be deemed final for United States Supreme Court review purposes. A state court judg-

ment which effectively terminates the litigation between the parties on the merits of the case, or leaves to the lower court the performance of only ministerial acts such as the entry of an order or judgment, is usually considered a final judgment for purposes of review by the United States Supreme Court. *Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948). However, a judgment or decree of the highest state court which reverses the decision of a lower court and remands the litigation to the lower court for further judicial proceedings has been deemed not to be a final judgment and cannot be reviewed by the United States Supreme Court. See *Prudential Ins. Co. v. Cheek*, 252 U.S. 567 (1920).

In the case at bar, the New Jersey Supreme Court directed a remand to the Law Division to make a factual determination, based upon the trial transcript, of what proof was offered by the State at the death by auto trial to establish respondent's recklessness. The outcome of this remand will determine whether principles of double jeopardy bar a subsequent prosecution of respondent for DWI pursuant to *Illinois v. Vitale*. This is clearly not a procedural mandate or the undertaking of a ministerial act by the Law Division. The purpose of the remand is directly related to the constitutional analysis for double jeopardy required by the New Jersey Supreme Court. Based upon the New Jersey Supreme Court's remand to the Law Division, a "final judgment" is not presented to the Court at this time for which jurisdiction is proper. Moreover, the State concedes that it may prevail on the merits at the hearing on remand by the attempted proof of respondent's recklessness in addition to intoxication.

The remand to the Law Division and the factual determination to be made from the trial transcript is necessary for several reasons. First, the remand constitutes a vital and integral part of the double jeopardy analysis set forth by the New Jersey Supreme Court. Second, the remand

to the Law Division must be concluded initially in order to avoid piecemeal litigation. In *Vitale*, this Court was required to remand the matter to the State of Illinois for a clarification of relevant state law, and further, a determination of what reckless act or acts the state would rely upon to establish recklessness in a trial for involuntary manslaughter. The present matter contains none of the factual issues in *Vitale* concerning what evidence the State may possibly use or seek to rely upon in a subsequent trial challenged as violative of double jeopardy. Nor will a bill of particulars be required from the State to establish what evidence might be used to establish respondent's recklessness. *Illinois v. Zegart*, 452 U.S. 948 (1981) (Burger, C.J., dissenting from denial of *certiorari*). The instant case, after the remand and findings of fact by the Law Division, presents to this Court a judicial scenario amenable to complete review in terms of the law and relevant facts, without the speculativeness attendant in *Vitale*. This opportunity presents itself because respondent was first brought to trial on the greater offense, and a review of the transcript thereof will conclusively establish the State's proof of respondent's recklessness offered therein. A subsequent decision by this Court, if any, could then be based upon a judicially established offer of proof submitted by the State at respondent's earlier death by auto trial. Moreover, the necessity of a remand will be obviated in the event of this Court's affirmance of the New Jersey Supreme Court.

Third, should respondent prevail on remand and establish as factual the State's now recanted concession, the State's position becomes meritless. This position would then support a different result in the case at bar from the nearly identical case of *Dively*, which was decided on *Blockburger* grounds. The only distinction between both cases would be a difference in the terminology of the respective death by auto statute. This distinction cannot be recognized by the Court as an impediment to constitutional

protection. Indeed, the change in 1981 in the terminology of the death by auto statute was to merely remove the "nebulous willful and wanton disregard standard" of the statute in order to correspond the statute to the existing culpability standard of "recklessly" under the Code of Criminal Justice. *State v. Potts,* 200 N.J. *Super.* 488, 492 (Law Div. 1985); *See State v. Milligan,* 202 N.J. *Super* 336 (App. Div. 1985), *aff'd per curiam,* 104 N.J. 67 (1986).

Lastly, should respondent prevail at the hearing on remand, respondent would have the opportunity to oppose the petition by the State on legal issues related to the inconsistent legal and factual position of the State throughout the proceedings. First, the State has agreed that the prosecution of respondent for the motor vehicle offense of reckless driving was precluded on double jeopardy grounds. Notwithstanding an arguable failure of the *Blockburger* test, the State obviously concedes that double jeopardy exists and that proof of the greater offense of death by auto necessarily established the lesser offense of reckless driving. *See Brown,* 432 U.S. at 167-68. The State's concession, therefore, could only have been based on an evidential review of the case, the State conceding that the evidence of respondent's recklessness in the death by auto trial necessarily established the offense of reckless driving. Should respondent prevail in the Law Division on remand, the proof of respondent's recklessness at the death by auto trial will be determined to be solely those matters dealing with respondent's intoxication, as also previously conceded by the State. Indeed, the issuance of the motor vehicle summons for reckless driving would then have to have been based solely upon the respondent's intoxication while driving. Further, based upon *Wenzel,* the State could not have prevailed on the motor vehicle offense of reckless driving with its contradictory and improper assertion of an "inference of recklessness" on the part of respondent, and would have had to submit proof of respondent's intoxication to prevail on the merits. The State should not

then be heard to oppose respondent's double jeopardy claim [for the DWI] when the State has previously stipulated that respondent's dismissed reckless driving offense was necessarily established by the State's proof of recklessness in the death by auto trial, now determined solely to be respondent's intoxication. The recanted concession before the New Jersey Supreme Court and the anomalous legal position of the State bespeaks of issues of prosecutorial vindictiveness, collateral estoppel and violation of due process. The remand in the Law Division is therefore required to resolve the factual issue before the New Jersey Supreme Court and afford respondent the benefit of viable issues for opposition to the State's petition for *certiorari*.

This Court should adhere to the concept that principles of comity and federalism are significant elements of the final judgment doctrine, and provide an "added force" thereto, and such principles must be considered and preserved by this Court under the facts of the instant case in order to afford meaningful review of the *Vitale* standard of double jeopardy analysis. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 505 (1975) (Rehnquist, J., dissenting).

POINT II

The Decision of The New Jersey Supreme Court Was Based Upon An Interpretation of The Double Jeopardy Provision of The New Jersey Constitution And As Such The Decision Is Supported By Adequate And Independent State Grounds.

It is well settled that the United States Supreme Court is without jurisdiction to review state court decisions that rest upon "adequate and independent state grounds". Justice Jackson, writing for the Court in *Herb v. Pitcairn*, 324 U.S. 117 (1955), summarized the adequate state grounds rule and its theoretical basis as follows:

> This court [has always] adhered to the principle that it will not review judgments of state courts

> that rest on adequate and independent state grounds. [The reason] is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.

Id at 125-126. This jurisdictional principle was further clarified in *Michigan v. Long*, 463 U.S. 1032 (1983), with the opinion of Justice O'Connor establishing a new criteria for determining whether United States Supreme Court jurisdiction would attach to a particular state court decision. Justice O'Conner's opinion states:

> [w]hen, . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41.

The New Jersey Constitution, article I, paragraph 11, provides in relevant part that:

> "No person shall, after acquittal, be tried for the same offense."

The State correctly points out in its petition that New Jersey courts have interpreted this double jeopardy protection of the New Jersey Constitution as co-extensive with the double jeopardy clause of the United States Consti-

tution. It is important to note that this "co-extensiveness" doctrine was derived solely from the fact that the language of the fifth amendment was facially broader than the double jeopardy provision of the state constitution. Specifically, the fifth amendment has been interpreted to afford double jeopardy protection in three instances, (a) subsequent prosecution after acquittal of the same offense, (b) subsequent prosecution after conviction of the same offense, and (c) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). On its face, the state constitutional provision would preclude a subsequent prosecution only in the event of a defendant's acquittal in a former prosecution. However, "[t]he history of the 1844 constitutional convention discloses that the use of the more limited phraseology was intended not to impair the common law maxim but to insure that a defendant is not entitled to immunity from a second trial where his first trial ends, not in acquittal, but in jury disagreement or other indecisive disposition." *State v. Currie*, 41 N.J. 531, 536 (1964). Pursuant to *Benton v. Maryland*, 395 U.S. 784 (1969), the New Jersey courts have construed the language of the state constitutional provision to be co-extensive with the three enunciated protections of the fifth amendment. *State v. Rechtschaffer*, 70 N.J. 395 (1976).

The New Jersey courts have often utilized the views of the United States Supreme Court on double jeopardy, and recognized them as influential and persuasive, though not controlling. *State v. Farmer*, 48 N.J. 145, 169 (1966). Additionally, the United States Supreme Court has acknowledged that state courts should be free and unfettered by the United States Supreme Court in interpreting their state constitution. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). More importantly, the New Jersey Supreme Court has recognized that in an appropriate situation the state constitution may independently furnish a basis for protecting personal rights when it is not clear that the guarantee of the federal Constitution would serve to grant that same

level of protection. *State v. Alston*, 88 N.J. 211, 225 (1981); *See also State v. Novembrino*, 105 N.J. 95, 145 (1987) (rejecting "good faith" exception to exclusionary rule for search and seizure under fourth amendment, *contra United States v. Leon*, 468 U.S. 897 (1984)); *See also State v. Kleinwaks*, 68 N.J. 328, 334 (1975) (state is free as a matter of its own law to afford an individual greater protection than is provided by the federal Constitution).

Under the standards established by *Long* to determine whether adequate and independent state grounds exist, the United States Supreme Court will not undertake to review the state court decision if it is alternatively based upon bona fide separate, adequate and independent grounds. *Id.* at 1041.

The New Jersey Supreme Court below mentioned the often cited proposition that the state constitutional protection is "co-extensive with the guarantee of the federal Constitution." (App. A, at p. 3a). As previously indicated, this proposition was the result of the differences in language between the two constitutional provisions, and it is well settled that the federal tripartite double jeopardy protections under *Pearce* exist as a minimum protection in addition to the protection afforded by the state constitution. *State v. Rechtschaffer*, 70 N.J. 395, 404 (1976).

It is respectfully submitted that the Court look beyond the four corners of the New Jersey Supreme Court's opinion and to prior state court decisions in order to more adequately inform itself of the established position of the New Jersey courts regarding double jeopardy. See *Delaware v. Prouse*, 440 U.S. 648 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

In the case at bar, the New Jersey Supreme Court accepted the rationale of *Vitale* as being consistent with its prior court decisions on double jeopardy. Based upon the following reasons, the New Jersey Supreme Court would render an identical decision regardless of an inconsistent

interpretation of *Vitale* by this Court. Such an opinion could clearly be rendered on the concept of federalism and the New Jersey Supreme Court's authority to afford citizens of the state greater protection against double jeopardy under the New Jersey Constitution.

The New Jersey Supreme Court in *State v. Dively*, 92 N.J. 573 (1983) set forth the underlying standard for determining what constitutes a "same offense" under the New Jersey Constitution:

> The significance of the term "same offense" is not limited to the same offense as an entity and designated as such by legal name, but it comprehends also any integral part of such offense . . . [w]here a lesser offense is a necessary ingredient or component part of the principal or greater offense and grows out of the same transaction, conviction or acquittal of the lesser bars further prosecution for the greater crime.

Id. at 581, citing *State v. Williams*, 30 N.J. 105, 114 (1959). It is also settled law in New Jersey that when the greater offense includes the lesser, prosecution for either bars a subsequent prosecution for the other. *Dively*, 92 N.J. at 580. However, the New Jersey Supreme Court, in addition to recognizing the constitutional safeguard against double jeopardy, has also recognized the difficulty which arises in determining just when a court is dealing with the same offense within the contemplation of the constitutional provisions. The court has taken the approach that, in applying the prohibition against double jeopardy, "the emphasis should be on underlying policies rather than technisms. The primary considerations should be fairness and fulfillment of reasonable expectations in the light of constitutional and common law goals." *State v. Currie*, 41 N.J. 531, 539 (1964). The court in *Currie* also acknowledged the "futility of efforts extended towards the formulation of a single legal test to operate absolutely and

inflexibly throughout the field of double jeopardy." *Id.* at 539.

An example of the New Jersey Supreme Court's flexible application of the test for double jeopardy in its appropriate constitutional dimension can be found in the court's decisions on statutory merger under the Code of Criminal Justice. (N.J. Stat. Ann. 2C:1-8 to 1-12). The concept of merger "implicates the prohibition against double punishment for a single offense." *State v. Truglia*, 97 N.J. 513, 522 (1984). Moreover, "[a]n attack on grounds of merger clearly implicates the substantive and constitutional rights of a defendant." *Id.* at 522, citing *State v. Rodriguez*, 97 N.J. 263, 267 (1984).

The State has argued in prior New Jersey Supreme Court decisions that the merger provisions of the Code of Criminal Justice have adopted the *Blockburger* test for determining whether a "same offense" exists. *Truglia*, 97 N.J. at 520. However, the court in *Truglia* indicated that "[t]his represents a more mechanical approach to merger than the flexible course formulated in *State v. Davis*, 68 N.J. 64 (1975)." *Truglia*, 97 N.J. at 520. The Court in *Davis* specifically provided that the Court should "employ a certain flexibility of approach to the inquiry of whether separate offenses have been established under the proofs." *Davis*, 68 N.J. at 81. The approach under Davis entails a factual analysis beyond the mere examination of the statutory elements under *Blockburger*, and considers, *inter alia*, the time and place of each violation, whether the proof of one offense would be a necessary ingredient to a conviction of another offense, and the intent of the accused. *Id.* at 81. The *Davis* court further recognized that "other factors" certainly exist which must be considered, and "accorded greater or lesser weight depending on the circumstances of the particular case." *Id.* at 81. Lastly, the Court stated, "[i]n reality we are simply reflecting . . . on the traditional determination of sufficiency of proofs." Id. at 82.

Further, the court in *Truglia* specifically indicated that the *Blockburger* test for defining a "same offense" suffered from "a certain sterility", and that the court has found it more comfortable in recent years to eschew the mechanical application of formulas to resolve merger questions, and to resort to the flexible approach of *Davis*. *Truglia*, 97 N.J. at 521. The decisions of the New Jersey Supreme Court on double jeopardy and the integrated concept of merger are reflective of the court's approach to address these issues in their constitutional dimension, and to provide for additional judicial scrutiny in double jeopardy matters beyond the limited review parameters of *Blockburger*.

It must be noted that the motor vehicle violation of N.J. Stat. Ann. 39:4-50 of which respondent is charged is not an "offense" for purposes of the Code of Criminal Justice. (N.J. Stat. Ann. 2C:1-14(k) defining the term "offense" for purposes of the Code, excluding specifically motor vehicle violations). Therefore, the provisions for merger within the Code can not apply. However, the New Jersey Supreme Court in *State v. Dively*, 92 N.J. 573 (1983), specifically indicated that motor vehicle violations "are within the category of offenses subject to the Double Jeopardy Clause [sic]." *Id.* at 586. It logically follows that the multi-faceted analysis for double jeopardy and merger questions for "offenses", as defined within the Code of Criminal Justice, must equally pertain to those "offenses" deemed by the New Jersey Supreme Court in *Dively* to be within the scope of double jeopardy protection. *See also State v. Saulnier*, 63 N.J. 199, 207-208 (1973) (court finding no sound reason for distinguishing between lesser included offenses which are indictable and those which are not). The alternative evidential test for double jeopardy provided by *Vitale*, in addition to the elemental *Blockburger* test, squarely fits within the scheme and rationale of double jeopardy analysis as established by the New Jersey Supreme Court.

In the alternative, should the Court decline to accept respondent's contention that the New Jersey Supreme Court would render an identical decision regardless of this Court's determination on the merits, respondent respectfully requests that clarification be requested from the New Jersey Supreme Court based upon the foregoing state law precedent. *Michigan v. Long*, 463 U.S. 1032, 1041 n. 6 (1983).

POINT III

The State's Proof of Respondent's Intoxication at The Death By Auto Trial Affords Respondent The Benefit of The Alternative Test For Double Jeopardy Analysis Provided By *Illinois v. Vitale*.

The State assumes in Point B of its petition that the New Jersey Supreme Court was correct in its determination that *Illinois v. Vitale* provides respondent with the protection of an alternate test for double jeopardy. Moreover, the remand in the instant case is remarkably similar to that in *Vitale*, except that the factual determination herein can readily be made from the transcript of respondent's death by auto trial, thereby removing any aura of speculativeness concerning the State's proof of recklessness therein.

Remarkably, while conceding that the New Jersey Supreme Court was correct in its holding, the State attempts to remove respondent from the purview of the New Jersey Supreme Court decision and the protection of *Vitale* without valid distinction. First, the death by auto statute in the case at bar and the involuntary manslaughter statute in *Vitale* contain the identical element, "recklessly", the State's proof of which being the subject of the remand to the Law Division. Additionally, the State concedes that double jeopardy protection under *Vitale* arises only when "the lesser offense is an example or species of, or *inevitably establishes an element* (emphasis supplied) of, the

greater offense (recklessness)." The remand by the New Jersey Supreme Court is clearly intended to determine whether respondent's offense for DWI was necessary to establish respondent's recklessness in the death by auto trial. Despite the foregoing, the state attempts to distinguish the instant case from *Vitale* based upon a gross misstatement of New Jersey law and a skewed presentation of relevant portions of applicable case precedent.

The State advances the proposition that there are inconsistent provisions within the New Jersey Supreme Court's opinion which indicate, first, that the *Blockburger* test is irrelevant to the double jeopardy protection afforded by *Vitale*, and second, that the opinion generates a suggestion that the *Vitale* test requires a partial consideration of the *Blockburger* test. This writer is unable to divine the basis or logic for the State's advancement of this purported inconsistency. The language cited by the State in the opinion is merely an iteration of the *Vitale* evidential test to be applied as between offenses which do not inherently lend themselves to judicial scrutiny under the *Blockburger* test. The evidential analysis of *Vitale* is applied to the "fact[s] prosecuted" upon in the earlier trial, and a determination is made whether the State has solely relied upon the ingredients necessarily included in the DWI offense to establish an element (recklessly) in the death by auto trial. *State v. Labato*, 7 N.J. 137, 145 (1951).

The State attempts to remove respondent from the scope of *Vitale* by contending that DWI is not capable of inevitably establishing "recklessness", based upon the statement in *Dively* that "[d]riving while drunk does not necessarily translate into reckless driving." *Dively*, 92 N.J. at 583 n.7. This quotation from the *Dively* opinion is incomplete, and the opinion further indicated, "[h]owever, here the municipal court judge stated, and the parties seemingly agreed, that the reckless driving was ascribable to the drunk driving." *Dively*, 92 N.J. at 583, n.7. More importantly, the New Jersey Supreme Court in *Dively* lis-

tened to the tape of the proceedings before the municipal court and concluded, "[t]he record below demonstrates clearly that the municipal court merged these charges into the drunk driving charge. Neither the defendant nor the prosecutor objected to the merger." Id. at 587. As a result of this merger of the reckless driving offense into the DWI offense the *Dively* opinion held that double jeopardy precluded a subsequent prosecution for death by auto. Therefore, the *Dively* opinion clearly indicates that DWI may be equated with reckless driving under certain circumstances. The State's prior concession in this regard, now recanted, is ominous and similar to the judicially accepted merger of the two offenses in *Dively*. The remand to the Law Division is required to determine whether the circumstances of the instant case mandate an equation of the DWI offense and the material element of "recklessly" in the death by auto statute.

Additionally, the New Jersey Supreme Court in *Dively* issued its directive that municipal court proceedings on DWI offenses be stayed pending clearance from the county prosecutor on the status of any proposed or pending death by auto indictment. Indeed, if the State were correct in its assertion that DWI is not a possible meaning of, nor can it establish, recklessness, the necessity for such a directive would be obviated. Under the State's theory, a double jeopardy argument could not be sustained as between DWI and death by auto. Obviously, the state's highest court has rendered a different interpretation of state law as that presented by the State herein.

Lastly, the State's misinterpretation of state law is again the premise upon which the State seeks to distinguish the case at bar from the relevant precedent of *Harris v. Oklahoma*, 433 U.S. 682 (1977) and *Pandelli v. United States*, 635 F.21 533 (6th Cir. 1980). This Court in *Harris*, after recognizing the state's concession that robbery was the underlying felony used by the state to support the felony murder conviction, held that double jeopardy barred a sub-

sequent robbery prosecution. In *Harris* the actual evidence was reviewed to determine which of the alternate felony elements of the felony murder statute would be the required predicate offense. The abstract *Blockburger* test was rendered meaningless absent this evidential review because of the alternative language of the felony murder statute. On a comparative basis, the court in *Pandelli* indicated that such an evidential analysis would be required in all cases where statutes were written in the alternative or where an element thereof contained numerous possible meanings. *Pandelli*, 635 F.2d at 537, 583. The statute in *Vitale* and in the instant case contain the element "recklessly" which is subject to various offers of proof by the State to establish its existence. The Court in *Vitale* and the New Jersey Supreme Court properly sought a reformulation of the statute in terms of the evidence to be utilized (or actually utilized) by the state in the prosecution of the greater offense.

Pursuant to this misinterpretation of state law, the State asserts that the "analogy" between the felony murder statute in *Harris* and the involuntary manslaughter statute in *Vitale* does not apply in the case at bar. The State obviously concedes that the careless failure to slow in *Vitale* would be considered an example or species of recklessness (or inevitably establishes that element), because the involuntary manslaughter statute of Illinois contains an element (recklessly) that is subject to many possible meanings. However, the State again asserts a legally unfounded proposition that drunk driving is not itself a species or possible meaning of the word recklessly (or cannot inevitably establish that element) which would deprive respondent of the benefit of *Vitale* and the supporting rationale of *Pandelli*.

As indicated earlier in this Brief in Opposition, the State's petition fails to mention relevant language in the New Jersey Supreme Court's opinion in *Dively*. Moreover, while presenting the position that drunk driving is not a

species of recklessness, nor can drunk driving establish recklessness, the State fails to cite what acts of a defendant would be considered within that realm. Further, New Jersey case law is to the contrary. In addition to the New Jersey Supreme Court decision in *Dively*, the Appellate Division held specifically in *State v. Casele*, 198 N.J. *Super* 462 (1985), that "[a] defendant's driving while intoxicated may support a determination of recklessness", clearly indicating that drunk driving could be a possible meaning of recklessness. Id. at 472. In addition, the death by auto statute provides in paragraph (b) thereof that the sentencing court may not suspend imposition of sentence upon conviction under the statute in the event that the defendant was "operating the vehicle under the influence of an intoxicating liquor . . .". The provision of this paragraph, and specifically the inclusion of the identical language of the DWI statute, clearly indicates that drunk driving may be the proof of recklessness offered by the State at a death by auto trial. It is therefore a possible meaning of the term "recklessly" in the death by auto statute, and the attempted proof of which by the State in this case affords respondent the protection of *Vitale*. Additionally, the New Jersey Supreme Court recognized this relationship in the aforesaid administrative directive in *Dively*, and further indicated therein that "when death occurs we (the New Jersey Supreme Court) expect a drunk driver to be charged with and tried for the *greater* (emphasis supplied) offense of death by auto." (Pet. App. A, at p. 13a).

Obviously, the death by auto statute cannot list seriatim those actions or omissions of a defendant which would be considered possible meanings of the word "recklessly". This material element of the statute, in the present case and as in *Vitale*, may be supported by single or numerous acts or omissions. Regardless of the quantum of actions or omissions that may exist as aforesaid to determine "recklessness", New Jersey law conclusively establishes that drunk driving is a possible meaning thereof, and may inev-

itably establish recklessness, upon which the *Vitale* analysis may be applied and double jeopardy protection afforded to a defendant.

POINT IV

The United States Supreme Court Decision of *Illinois v. Vitale* Established An Alternative Test For Double Jeopardy Analysis in Addition to The Test Established by *Blockburger v. United States* And Affords Respondent Constitutional Protection Against Double Jeopardy.

The issue before this Court is whether the double jeopardy analysis of *Illinois v. Vitale* affords respondent constitutional protection against double jeopardy. The State contends that this Court's opinion in *Vitale* does not purport to create a double jeopardy analysis beyond the established elemental analysis of *Blockburger v. United States.*

The resolution of this issue must be premised upon the constitutional foundation of double jeopardy and that the "protection against successive prosecutions is the controlling constitutional principle of the double jeopardy clause." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Moreover, the term "offense" within the fifth amendment was clearly intended to relate to the conduct of a defendant rather than a reference to an abstract statutory definition of a crime. This was reflected in this Court's decision in *Ex parte Nielsen*, 131 U.S. 176 (1889), which indicated that where "a person has been tried and convicted [or aquitted] for [of] a crime which has various incidents [conduct] included in it, he cannot be a second time tried for one of those incidents included in it without being twice put in jeopardy for the same offense." *Id.* at 188. See *Vitale*, 447 U.S. at 417. It is respectfully submitted that the *Vitale* decision was the result of this Court's consideration of the historical and constitutional basis of the double jeopardy clause, and this pragmatic

decision serves to achieve the protection originally intended by the fifth amendment, based upon the sometimes inapplicability of the *Blockburger* test for double jeopardy.

This Court has ruled that the "principal" test for determining whether two offenses are the "same" for double jeopardy purposes is that set forth *Blockburger*. *Brown*, 432 U.S. at 166. A description of this test was iterated in *Vitale*, which emphasized that the *Blockburger* test focused upon the statutory elements of the two offenses. *Vitale*, 447 U.S. at 416. Based upon the facts of a particular case and the availability of statutory offenses that are amenable to *Blockburger* analysis, the inflexible methodology of the *Blockburger* test will continue to preserve and protect the constitutional safeguard against double jeopardy. Indeed, the New Jersey Supreme Court below recognized the *Blockburger* test as one which affords constitutional protection, however, the *Blockburger* test was rendered "meaningless" because of the language of the respective statutes involved. (Pet. App. A, at p. 13a).

Most importantly, this Court has never ruled that the *Blockburger* standard of double jeopardy analysis is the only standard for determining whether a same offense exists to preclude a successive prosecution. Such a proposition would partially emasculate this constitutional safeguard by rendering it available only to those defendants who were fortunate enough to be charged with offenses whose statutory language was amenable to review under *Blockburger*. The protection against double jeopardy would merely be a function of legislative terminology rather than underlying conduct which is the theoretical core of this constitutional principle.

Further, the Court in *Brown* specifically recognized that the statutory elemental analysis of *Blockburger* was not the sole test for double jeopardy. *Brown*, 432 U.S. at 167 n.6. The Court's footnote references the collateral estoppel issue of *Ashe v. Swenson*, 397 U.S. 436 (1970), and more

importantly, the double jeopardy standard of analysis provided by *Nielsen*. In both cases, application of the *Blockburger* test would not bar a successive prosecution, however, the Court properly recognized the utility and necessity of an alternate, fact-sensitive analysis which would focus upon repetition of proof and identical criminal conduct in determining the merits of a double jeopardy claim. This recognition by the Court in *Brown* is consistent with the Court's holding that a greater offense is the "same offense" as any *necessarily* (emphasis supplied) included offense. *Brown*, 432 U.S. at 168. No valid distinction can be made, in a constitutional analysis, between the establishment of the "necessarily included" offense through legislative terminology or by the facts and underlying conduct of a defendant in a particular case. The Court's decision in *Brown* merely presents a restatement of the Court's understanding of the double jeopardy clause since *Nielsen*. *Brown*, 432 U.S. at 168.

The State contends that *Vitale* could not be meant by this Court to modify *Blockburger* because of policy considerations militating against such modification. The absurdity of suggesting this type of judicial consideration to emasculate the constitutional protection against double jeopardy transcends the obvious. First, the State asserts that the *Blockburger* test is the only appropriate test because of the certainty it provides and its ease of application. No case cited or known to this writer stands for the proposition that the *Blockburger* test was a derivative of the Court's quest for certainty and ease of application in the context of double jeopardy analysis. Indeed, the *Blockburger* test cannot result in a streamlined approach to judicial review of a claim of double jeopardy in light of the myriad of statutory offenses presently in existence. This wide range of statutory offenses includes statutes which have predicate and compound components (*Pandelli*) and which contain an element which has several possible alternative elements and is the subject of multiple possible

meanings. The "recklessness" requirement of the death by auto statute in the instant case, and in *Vitale*, are examples of this latter type of statute. The *Blockburger* test cannot logically afford its espoused benefits under circumstances which preclude its application *ab initio* because of the legislative terminology of certain statutes. *Blockburger* analysis can not be utilized uniformly througout the universe of statutory offenses, and because of this limitation, this Court was required to fashion a type of pragmatic double jeopardy analysis which affords a defendant, regardless of statutory terminology, an opportunity to prevail on a double jeopardy claim. The only certainty generated by the State's contention regarding the *Blockburger* test is that certain defendants will be precluded from asserting a claim of double jeopardy because of their unfortunate predicament of being charged with two statutory offenses that are not amenable to *Blockburger* analysis. This preclusion would exist despite the facts of a particular case which would conclusively establish that the underlying conduct was similarly proscribed by each statutory offense, and that the establishment of the greater offense necessarily established the lesser offense.

This Court's decision in *Vitale* clearly acknowledged the Court's awareness that *Blockburger* in all instances would not provide an effective means to determine the merits of a double jeopardy claim. The Court made reference to its decision in *Harris v. Oklahoma* and its modified approach to double jeopardy analysis when the *Blockburger* test was precluded from being utilized by the terminology of the statutory offenses themselves. The essence of the *Blockburger* analysis, namely, whether the greater offense necessarily involves proof of the lesser, is preserved by this Court's opinion in *Harris* and in *Vitale*. Although the test mandated by the latter cases is fact-sensitive, this evidential methodology constitutionally affords a defendant an alternative means to invoke constitutional protection

against double jeopardy when application of the *Blockburger* test is precluded.

The State further contends that the *Vitale* decision will generate uncertainty and confusion in the New Jersey courts in the event of a trial for death by auto and a subsequent proceeding for drunk driving. This position disregards the determination of the New Jersey Supreme Court that joinder of the offenses is necessary in order to effectively address a double jeopardy claim under *Vitale*. (App. A, at p. 13a). Further, Directive 10-82 from the New Jersey Administrative Director of the Courts, promulgated May 3, 1983 subsequent to the *Dively* decision, has been interpreted to require mandatory joinder of all motor vehicle violations incident to the return of an indictment following an accident causing death or personal injury. See *State v. Loyle*, 208 N.J. *Super.* 374, 336 (App. Div. 1986).

Lastly, the State contends that the remand required by the New Jersey Supreme Court presents an ominous task incapable of competent review by the Law Division. The remand will require the Law Division to review the transcript of the earlier death by auto trial to determine the State's proof of respondent's recklessness. In future cases, this judicial determination will take place in the single judicial proceeding on the death by auto offense. The State attempts to portray this judicial task as beyond the competent reach of the state judiciary. Obviously, the New Jersey Supreme Court has deemed the Law Division capable of such an endeavor. In any event, constitutional safeguards should not be foregone by the lack of a simplistic test to determine their existence, or by the extent of judicial effort to be expended in the preservation thereof.

CONCLUSION

Based upon the foregoing reasons, the writ of certiorari requested by the State of New Jersey should be denied.

Respectfully submitted,

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